

ACLU

Michigan

House Law & Justice Committee

RE: HB 5017

Position: Oppose

December 5, 2017

The breadth and severity of bullying demands a response from communities, parents, schools and legislatures; however, regulation of online speech treads on delicate constitutional territory. In our efforts to make the internet safer, we must be cautious not to enact overly broad legislation creating unintended consequences that restrict the freedom of speech guaranteed by the First Amendment. The ACLU of Michigan supports anti-bullying measures, but opposes HB 5017 because of its potential to censor protected speech.

We have all heard the heart breaking stories of tragedies with bullying at their core. While recognizing the concern many people have about the dangers of the internet, especially for children, we urge this legislature to avoid taking steps that would criminalize protected first amendment speech, and instead to support programs that would educate and inform children, parents, educators, and the public in general about online risk prevention and internet safety practices.

The question on where to draw the line between constitutionally protected speech and unlawful harassment is the crux of the intersection between free speech and cyber bullying; however, the courts have not specifically addressed this issue. The First Amendment does not permit targeting speech merely because it is offensive, reprehensible, or even hurtful to the unsuspecting listener or reader. As reprehensible as some online speech may be, the First Amendment protects the bad with the good.

Censoring online speech is unconstitutional under the First Amendment, unless it falls into one of a few narrow exceptions or amounts to unprotected conduct. Although some bullying *may* rise to the level of threats that are not protected by the First Amendment, most cases of cyberbullying are unlikely to qualify as a true threat because they often involve harassment and taunting or ridicule without direct assertions of intended physical violence. We must be cautious to criminalize speech that may not constitute a true threat as established under First Amendment legal precedent, despite the negative and even deadly ramifications on the target.¹ Although HB 5017 provides specific examples as to what would constitute cyberbullying, these provisions are problematically focused on public forums of the internet. Public forums of the internet are and must be given more constitutional protections than a private, directly communicated message to an intended victim. Accordingly, we are concerned that HB 5017 is not narrowly tailored enough to regulate speech in a public form to pass constitutional muster. Additionally, even for acts that fall squarely within the intended scope of this legislation, it is unclear what level of causation between a person's speech in a public cyber forum and the death of another person is required for a violation under this legislation. This too is important for discerning the depth of restriction on an individual's speech.

Ultimately, as heinous, inappropriate, and hurtful as some speech may be, the only way for the internet to remain a true market of ideas is by continuing to promote the free exchange of information and speech, with the understanding that online speech can be as beneficial or as hurtful as speech occurring offline. While some may say that the ease of communication because of technology necessitates the need for special restrictions, the ACLU believes that any restriction that intentionally curbs the speech rights of individuals in an electronic forum is a step in the wrong direction and not in keeping with the

¹ *J.S. v Bethelhem Area Sch. Dist.*, 807 A.2d 847, 860 (PA 2002).

ideals of our constitutional framework. We encourage this legislature should pursue various other avenues to alleviate cyberbullying that are well within the First Amendment such as education, training, and counseling in home and schools to help prevent cyberbully in a more proactive manner than cyberbullying laws.

Respectfully submitted,

Kimberly S. Buddin
Policy Counsel
American Civil Liberties Union of Michigan
Kbuddin-crawford@aclumich.org
(734) 945-2636